UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SEATTLE UNIVERSITY, Employer, and SEIU LOCAL 925, Petitioner.	CASE 19-RC-122863 SEIU LOCAL 925's STATEMENT IN OPPOSITION TO REQUEST FOR REVIEW

SEIU Local 925 opposes the request for review filed by the Employer, Seattle University (SU or the University). In his Decision and Direction of Election, the Regional Director applied existing Board law with respect to jurisdiction, managerial status, and bargaining unit composition. With respect to jurisdiction, the request for review asserts that existing Board law is unconstitutional and the Board should adopt the test set by the Court of Appeals for the D.C. Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir., 2002). The Board's "substantial religious character" standard, however, is current Board law which the Regional Director was required to apply, and the Regional Director correctly found that SU clearly falls within the Board's jurisdiction under that test. Moreover, the facts establish that the Board's assertion of jurisdiction over Seattle University creates no significant risk of constitutional infringement under the Board's current standard or any other proposed standard for determining

appropriate limits the Board's jurisdiction, including the D.C. Circuit's *University of Great Falls* standard championed by the University here.

With respect to the other issues for which SU requests review, the University asks the Board to ignore the overwhelming weight of the evidence and to rely on sweeping pronouncements of SU policy and practice unsupported by specific evidence. SU mis-states both the facts in the record and prior Board decisions with respect to managerial status and the composition of faculty bargaining units. The Regional Director is clearly correct that SU non-tenure track (NTT) faculty members possess no managerial authority. Nothing in the request for review demonstrates a factual error or departure from Board precedent on that issue. The record is also clear that full-time and part-time NTT faculty members share a community of interest typical of that shared by full-time and part-time employees in other business settings. And the record is clear that faculty members who teach in the College of Nursing and the School of Law are in separate organizational and administrative units from faculty in the appropriate unit, have significantly different terms and conditions of employment from the members of the appropriate bargaining unit, and could each stand alone as separate bargaining units bargaining with the University about their own distinct and separate employee concerns and issues.

The request for review does not establish that the Regional Director departed from official Board precedent or that the decision is clearly erroneous on a substantial factual issue, nor does it establish that there are compelling reasons in this case for reconsideration of Board rules or policies. Under Section 102.67(c) of the Board's Rules and Regulations, the Board should deny the Employer's request.

I. The Regional Director Correctly Asserted Jurisdiction over SU, and the Employer Has Not Established a Compelling Reason for a Grant of Review.

The Regional Director correctly found that SU is not a church-operated institution within the meaning of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) and properly asserted jurisdiction. As the Regional Director stated, SU receives no funding from the Catholic Church or the Society of Jesus and is explicitly independent of those organizations; neither SU's purpose nor its mission statement is religious; only a minority of SU's student body is Catholic; and NTT faculty members are subject to no religious requirements whatsoever. These factors alone warrant denial of the request for review because they establish that the Board's assertion of jurisdiction over SU creates no significant risk of constitutional infringement under any jurisdictional standard.

SU asserts that since the Board accepted review in other faculty cases and has invited amicus briefs in *Pacific Lutheran University*, Case 19-RC-102521, the Board should accept review in this case. However, it is not necessary for the Board to accept review of the instant case because the facts so clearly establish that SU is at most a secular institution with a liberal arts heritage, thoroughly autonomous from the Catholic Church, which does not provide a religious education or a religious educational environment. These facts are based on SU's own documents and public representations of its nature and environment, which describe its "Jesuit Catholic" character in terms being committed to "diversity, free speech, and academic freedom" and in terms of offering, at most, optional opportunities for "constituents" (faculty, staff, and students) to become educated about Catholic and other religious traditions, as those constituents are offered opportunities to be educated about other subject matters such as art, science, and

politics, and just as they would be educated in public university settings about all of those topics.

Thus, even if the D.C. Circuit standard advanced by SU were to be adopted by the Board, SU would not escape its obligations and responsibilities under federal law. That standard looks at whether the institution holds itself out as providing a religious educational environment. The rationale for this aspect of the D.C. Circuit's standard is that public representations act as a "market check" on institutions that may not truly offer a religious educational environment. This market check is clear in SU's public documents and pronouncements. Unlike in *Carroll College*, 558 F.3d 568 (DC Cir. 2008), SU's mission statement, posted throughout its campus, is wholly secular and there is no evidence of a religious statement issued by SU's board of trustees. On widely accessible materials, such as SU webpages and course catalogs, SU characterizes its "Catholic Jesuit higher education" in terms of secular values and historical tradition and makes clear that its curriculum is secular, it is committed to academic freedom, and there are no religious expectations of anyone. Also telling in its public pronouncements are the University's accreditation documents. The accreditation agency gives the University a choice of identifying itself as an institution that provides a religious education or as one that does not seek to instill a specific belief system or world view. SU chose to describe itself as an institution that "does not seek to instill a specific belief system, world view, or statement of faith." Crawford, xxx; U Ex 4, page 80. There is no need to make any inquiry into the nature of the University's religious beliefs or the teachings and traditions of the Catholic Church. There is no need to inquire into "how effective the institution is at inculcating its beliefs" or the manner in which it inculcates its beliefs (by a velvet glove or an iron fist) because the institution expressly disavows that it inculcates any beliefs. No inquiry need be made as to the "centrality" or "legitimacy" of its beliefs; no inquiry need be made into whether its function and purpose are primarily secular; no

inquiry need be made into whether it engages in proselytizing. By its own description to its accrediting agency, inculcation of is not any purpose of the University. There is no risk of First Amendment entanglement arising out of the inquiry process, because the University's public pronouncements eliminate the necessity of the inquiry itself. SU's professed purpose and the function of the petitioned-for NTT faculty is a secular one—to provide secular higher education, not a religious education.

Seattle University wants to have it both ways. On the one hand it wants to be a secular university, with a secular curriculum, student body, and faculty that attract the tuition and fees of non-religious students, hugely subsidized by federal and state grants and loans. It wants to be a major player in the Pacific Northwest system of higher education and a respected center of broad-based intellectual activity. In furtherance of these goals, SU tells the "market" through its public documents that it does not seek to instill in its students a "statement of faith," and it assures its constituents that it is "explicitly and officially" autonomous from the Catholic Church. Er Ex 71. Seattle University submits itself to all kinds of federal and state regulation in furtherance of its secular goals, including EEOC regulations that prohibit SU from inquiring about the religious views of its employees. On the other hand, when its faculty seeks an opportunity to bargain collectively with the University to improve their terms and conditions of employment, SU claims that seeking to graduate students with integrity and leadership skills who contribute to their communities and are committed to social justice is the province of a religious institution. It is not. And saying it does not make it so, no matter how many times or ways SU says it.

The fact that the Society of Jesus is affiliated with the Catholic Church and believes that

providing a secular education (a secular enterprise) furthers its religious faith does not render the secular enterprise a religious one under *Catholic Bishop* or any jurisdictional test generated under *Catholic Bishop*. The authority of the Society of Jesus to recall SU's president from his position as president, the participation of a handful of members of the Society of Jesus in the life of Seattle University, and a corner of the University's vast administrative structure dedicated to providing optional opportunities for constituents to learn about Catholicism and other religious denominations does not render the entire Seattle University beyond the reach of the National Labor Relations Act. SU has not established a compelling reason for the Board to grant review of this issue, and the request for review should be denied.

II. The Regional Director Correctly Found that Full-Time NTT Faculty Are Not Managerial Employees, and the Employer Has Not Established a Compelling Reason for a Grant of Review on its Managerial Assertions.

SU had the burden at hearing to prove its assertion that its full-time NTT faculty members are managerial, and, as is evident in the Regional Director's Decision, SU failed to meet that burden. In its request for review, SU tries to resurrect this issue by asserting that the Regional Director misapplied the standard for determining managerial status and disregarded Board precedent. However, the Regional Director's finding that SU's full-time NTT faculty are not managerial is clearly in accord with the cited Board decisions on university faculty bargaining units.

As the Regional Director said in his decision, there are no Board cases in which the petitioned-for bargaining unit included only non-tenure-track (NTT) faculty and in which the Board determined that the NTT faculty were managers. In its request for review, the University attempts to bootstrap its full-time NTT faculty into managerial status by asking the Board to

make two decisions: first, that SU has granted its tenured and tenure-track (T/TT) faculty managerial authority in a "shared governance structure," and second, that full-time NTT faculty "are active members" with T/TT faculty in the shared governance structure. The University puts all of its managerial issue eggs in this basket. However, the issue of the managerial status of TT/T faculty was not presented or litigated in this case, and SU presented no specific evidence that any individual NTT faculty member ever exercised actual managerial authority.

For SU to assert, on the basis of the record in this case, that it has given its full-time NTT faculty the authority to "manage" or "control" the University is absurd. As the Regional Director noted in his decision, while the academic assembly does permit two of its 19 seats to be filled by full-time NTT faculty, all academic assembly "decisions" are recommendatory only and must be approved by multiple layers of administration. Moreover, SU's assertion that the academic assembly must "approve new or substantially revised academic programs" is simply not supported by the record. Three years of academic assembly minutes [Er Ex 75] show only that the assembly's role is to approve "memos" written by its program review committee. None of the memos are in evidence, and the content of the memos is described only as lists of positives and negatives about the program being reviewed. On subjects other than curriculum, the minutes of the assembly show only that information is sometimes given to the assembly by administrative personnel, and the assembly sometimes discusses the information that provided. The minutes do not show that the assembly made any decisions that controlled academic affairs. As the Regional Director said in his Decision, even the one piece of testimony about the provost rarely rejecting academic assembly recommendations is not supported by the minutes of the meetings.

As found by the Regional Director, NTT faculty do not have an incentive to participate in University governance because the University governance system does not evaluate them for

tenure and because their year-to-year contracts pose a hurdle to serving on three-year governance committees. In addition, NTT faculty, unlike T/TT faculty, are not compensated for committee service.

SU attempts to establish managerial status of full-time NTT faculty by making sweeping generalized statements about faculty governance which are either unsupported by any specific evidence or are contradicted by specific testimony. For example, SU repeatedly refers to Employer Exhibit 32, a list of unidentified NTT faculty who served on "committees." SU was warned by the Hearing Officer that the list was worthless without evidence of the composition of the committees, their areas of responsibility and extent of authority, the types of decisions they make, the effectiveness of the decisions, and the length of committee member service. SU presented no such evidence and now baldy, and vaguely, asserts that the list is evidence that NTT faculty make managerial decisions.

The Regional Director is correct that SU has not met its burden of showing that full-time NTT faculty members possess and exercise control, discretion, or authority that would defeat their collective bargaining rights. The request for review offers nothing to cast doubt on the Regional Director's Decision. The University's theory that T/TT faculty are managerial and that NTT faculty are "active participants" in "shared governance" with T/TT faculty is wholly fictitious. The Regional Director's decision in this regard applied existing Board law and is not erroneous on any substantial factual issue. The Board should deny SU's request for review.

III. The Regional Director Properly Included Full-time and Part-time NTT Employees in the Same Bargaining Unit, and the Employer Has Not Established a Compelling Reason for the Grant of Review of that Conclusion.

SU asks the Board to reject the Regional Director's detailed and careful analysis of the law and evidence on the community of interest factors shared by SU's full-time and part-time NTT faculty in the petitioned-for bargaining unit. SU quotes traditional community of interest language in Board case law, but then ignores that law and defines the community of interest necessary to include full-time and part time NTT in the same unit was one in which "every employee in the proposed unit shares a community of interest with every other employee." SU also asserts that there is a "general rule" that part-time faculty do not share a community of interest with full-time faculty, citing *New York University*, 205 NLRB 4 (1973). Obviously there is no such general rule. If there is a "general rule" with respect to the inclusion of full-time and part-time employees in the same bargaining unit, that general rule is that where the petition describes a bargaining unit of full-time and part-time employees who perform the same work at the same location under similar working conditions, that unit is found appropriate by the Board.

There are several glaring errors in the University's proposed analysis on this subject. First, SU appears to assert that full-time NTT faculty would more appropriately be included in a unit with T/TT faculty. In this regard SU acknowledges, then attempts to discount, Board and court precedent that assigns great weight to the differences between tenured and tenure-eligible faculty on the one hand, and non-tenure eligible faculty on the other. As the Regional Director noted in his Decision, however, eligibility for tenure is a "critical factor" in faculty bargaining unit determination cases. Second, the University completely ignores the fact that, in making unit determinations, the Board looks first to the petitioned-for unit, and if it finds that unit appropriate, the Board's inquiry ends. *E.g., In re Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011); *Parsons School of Design*, 268 NLRB 1011, 1012 (1984). Third, SU isolates a single fact from a pre-*Specialty Healthcare* case and asserts that single fact

should be controlling in this case. [SU asserts that full-time and part-time contingent faculty in *Kendall College*, 228 NLRB 1083 (1977), were not included in the same unit solely because full-time faculty were paid on the basis of pro-rated full-time contracts and part-time faculty were paid on a per course basis. In *Kendall College*, however, the Union's petitioned-for unit excluded faculty hired on a per course basis, and, as is evident from the Seventh Circuit's enforcement of the Board's order, there were a myriad of other significant differences between the petitioned-for employees and the employees the Union sought to exclude from the unit.]

With respect to the evidence of community of interest factors, SU's request for review asserts that full-time and part-time NTT faculty have different compensation, participation in University governance, and working conditions. To the extent that such distinctions even exist, however, they do not defeat the factors that the Regional Director relied upon to find a unit including both full-time and part-time faculty members is appropriate. Among these are: shared supervision; shared skills and duties; shared benefits for those who teach four or more courses in an academic year; shared teaching conditions, including ineligibility for tenure and the absence of a research or publication requirement; a shared minimal-to-no service expectation; a shared interest in the University's practice of shifting full-time and part-time faculty to different classes and teaching loads; and significant contact between full-time and part-time NTT faculty members. Nothing that the University says in its request for review about asserted differences between full-time and part-time faculty negates the Regional Director's findings. With respect to the "interchange" factor, in particular, the University asks the Board to ignore the overwhelming evidence that 1) part-time and full-time NTT faculty teach the same exact courses on the lists of hundreds of core curriculum classes offered each year and 2) part-time and full-time NTT faculty

are substituted for each other without the core curriculum office even recording their full-time or part-time status.

SU mistakenly believes that this case is about whether a unit different than the petitioned-for unit would also be an appropriate unit. That is not the issue; the issue is whether the petitioned-for unit is appropriate. The Regional Director's decision that SU's full-time and part-time NTT faculty are "readily identifiable as a group" and share a sufficient community of interest to constitute a single bargaining unit is fully supported by the record and is fully in accord with Board precedent. The University has presented no compelling reason that the Board should grant review of the inclusion of full-time and part-time NTT faculty in the same unit, and the request for review should be denied.

IV. The Regional Director Correctly Concluded that SU Failed to Establish that Nursing and Law Faculty Share an Overwhelming Community of Interest with Faculty in the Appropriate Bargaining Unit, and the Employer Has Not Established a Compelling Reason for Grant of Review of that Conclusion.

SU erroneously asserts that the Regional Director misapplied *Specialty Healthcare* in excluding College of Nursing and School of Law faculty from the bargaining unit found appropriate. The University faults the Regional Director for not addressing the similarities that College of Nursing and School of Law share with employees in the bargaining unit found appropriate. SU clearly does not understand the issue. Contrary to SU's position, the issue is not whether College of Nursing and School of Law faculty share a community of interest with employees in the bargaining unit. The Union and the Regional Director acknowledge that in some ways College of Nursing and School of Law faculty do share a community of interest with employees in the appropriate bargaining unit. The issue is also not, as suggested by the University, whether the unit found appropriate is the *most* appropriate unit. The issue is, in essence, whether SU has met its burden of proving that the petitioned-for bargaining unit is

*in*appropriate unless the excluded classifications are included. E.g., *Specality Healthcare*, 357 NLRB at fn 28. SU has not met, and cannot meet, that burden.

The Board in *Specialty Healthcare* is very clear that where an employer challenges an otherwise appropriate unit on the basis of excluded classifications, the employer bears not simply the burden, but a "heightened burden," of demonstrating that "the employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit" such that the community of interest factors "overlap almost completely." Id. at 15-16 (citations omitted). This heavy burden is assigned in part because it is the employer who is "in full and often near-exclusive possession of the relevant evidence." Id. at fn 28. Although SU repeats the similarities between members of the appropriate unit and nursing and law faculty, SU did not produce evidence to meet its burden and SU has not overcome the significant distinctions in terms and conditions of employment cited by the Regional Director and contained in the record.

As the Regional Director said in his Decision, the Board considers an employer's "administrative groupings" a meaningful distinction between groups of employees. In this regard the Regional Director cited *Odwalla*, 357 NLRB No. 132 (2011). In *Odwalla*, the Union's proposed exclusion did not correspond with any administrative grouping of the employer, and, in the absence of that meaningful distinction, the Board rejected the exclusion. As the Regional Director said in his decision in this case,

> to begin with the obvious, the School of Law and College of Nursing are clearly identifiable as distinct divisions of the University, and therefore their faculty form rational, easily identifiable groupings that correspond to the Employer's administrative groupings.

The fact that SU also cites *Odwalla* in support of its position with respect to the College of Nursing and the School of Law demonstrates SU's misapprehension of the issue. There is nothing in the record or the Employer's request for review that challenges the obvious reality

that the College of Nursing and School of Law are separate administrative groupings with the University's administrative structure.

In addition to the fact that Nursing and Law are administratively distinct divisions of the University, the Regional Director recognized other significant distinctions in employment terms and conditions between employees in the appropriate unit and those in the College of Nursing and School of Law. With respect to the College of Nursing, for example, an off-campus clinical facility, the Clinical Performance Lab, is central to the College of Nursing program; nursing faculty are subject to numerous licensing and documentation requirements that do not apply to faculty in the unit found appropriate; nursing faculty have different summer teaching requirements and teach in clinical settings at all hours of the day and night; and there is no evidence of significant contact between nursing faculty and faculty in the unit found appropriate. In addition to these factors cited in the Regional Director's Decision, the record includes other significant evidence that College of Nursing faculty, if they desire to bargain collectively with the University, could appropriately do so separately from faculty in the unit found appropriate by the Regional Director. These factors include the University's consideration of creating "joint appointments" with hospitals for nursing faculty [Er Ex 75, minutes of 5/20/13 meeting]; consideration of the excepting nursing faculty from policies applicable to other faculty because of nursing faculty retention challenges and unique and strenuous licensure requirements [Id.]; "profound competition among colleges and universities for nursing faculty" and the University's corresponding need and desire to address unique nursing faculty characteristics in different ways than it addresses characteristics of the other faculty, in part by creating a NTT "career ladder" and "opportunities for advancement" for NTT nursing faculty [Crawford, 359-361, 690-691; U Ex 15, p 4]; an extensive and highly specialized internal governance and committee structure in

the College of Nursing [U Ex U Ex20, p 6-23; U Ex 119, p 25]; stringent admission, progression, completion, and employment requirements for nursing students, which necessarily require intimate faculty involvement in the details of student progress [E.g., U Ex 60-61, 113, 115, 117, 119, 120; Crawford, 1260-1268, 1272-1276, 1277-1281]; the performance of teaching and clinical supervision faculty functions by "preceptors" who sometimes are not even employees of the University [Crawford, 1250; U Ex16, p 11]; a mentoring program to assist nursing faculty in clinical training positions [U Ex 120, p 58]; and every day policy differences such as reimbursement for mileage, requiring certain nursing faculty to carry pagers, or requiring clinical nursing faculty to make decisions and notify administration about weather cancelations. U Ex 118; U Ex 119, unnumbered p 8, 21, 23; U Ex 120, p 57; Er Ex 46, p 8; Er Ex 47, p 9. Even this partial list of significant terms and conditions of employment specific to the College of Nursing faculty demonstrates beyond a doubt that the University cannot establish that nursing faculty community of interest is "almost a complete overlap" with that of faculty in the unit found appropriate by the Regional Director.

As found by the Regional Director, the Board has repeated certified separate units of law school faculty members, citing *Univ. of Miami*, 213 NLRB 634 (1974); *Syracuse Univ*., 204 NLRB 641 (1973); *Catholic Univ. of America*, 201 NLRB 929 (1973); and *Fordham Univ*., 193 NLRB 134 (1973). In finding significant distinctions between School of Law faculty and faculty in the appropriate unit, the Regional Director listed such factors as the School of Law's entirely different academic calendar from the rest of the University, which uniquely includes a January term, and the existence of School of Law NTT job classifications that do not exist in other administrative groupings. The Regional Director also relied on the facts that 1) the School of Law permits NTT faculty in "Lawyering Skills" classifications to "opt into" tenure track, 2) that

there is no evidence of law school faculty contact with faculty outside the School of Law, and 3) that only law school faculty teach in the law school building. An addition significant factor that the Board considers in finding that law school faculty constitute a separate appropriate unit is the fact that the American Bar Association imposes stringent requirements specific to the education of lawyers in order for the school to meet accreditation standards. Also significant is the fact that law schools, including the School of Law here, have extensive internal administrative structures and maintain local control over curriculum, admissions, scheduling, fundraising, and promotion and tenure of faculty. As with its position on the College of Nursing, the University has failed to prove that law faculty share an "overwhelming community of interest" with bargaining unit members or that there is "an almost complete overlap" between law faculty and employees in the appropriate bargaining unit.

The Regional Director is clearly correct that there is a rational basis for excluding College of Nursing and School of Law faculty from the appropriate bargaining unit. The University failed to prove otherswise and its request for review should be denied.

V. The Regional Director Correctly Concluded that SU Did Not Meet its Burden With Respect to the Exclusion of Clinical Faculty from the Bargaining Unit, and the Employer Has Not Established a Compelling Reason for the Grant of Review of that Conclusion.

The University objects to the Regional Director's exclusion of the clinical professor job series from the bargaining unit, asserting that it had no opportunity to present evidence or to address the issue. Contrary to the University's assertions, the University was aware of this exclusion during the hearing and the issue of clinical faculty came up several times, including in the provost's lengthy testimony about the University's "Faculty Titles" document. Er Ex 15. As the Regional Director noted in his Decision, record evidence (including this document) suggests

that clinical faculty qualify for their positions in different ways than other classifications of faculty, since they qualify through professional experience rather than by virtue of academic credentials. Similarly, the Regional Director noted that, unlike other faculty, clinical faculty teach largely outside of the traditional classroom. In testifying about the clinical faculty series, the provost testified that the series was created in order that SU have "a category of appointment for those individuals who what to be academic nurses whose focus is primarily on the training of students [and] who do not want to have the burden of the research requirement necessary for tenure." Crawford, 359-361, 690-691; U Ex 15, p 4. When he was unable to recall, early in the hearing, any faculty outside the College of Nursing in the clinical series, he testified that he could provide that information at a later date. However, the only information SU produced after that date is Union Exhibit 75, produced pursuant to subpoena, which lists NTT faculty in the current academic year. This exhibit lists two person outside of the College of Nursing with "clinical" titles, both of whom (Mary Kay Brennan and Riva Zeff) were excluded from the bargaining unit as administrative faculty by stipulation of the parties. Er Ex 80.

In objecting to the Regional Director's exclusion of the clinical professor series from the bargaining unit, SU is manufacturing a new issue. SU failed to present any evidence showing that clinical faculty exist outside of the College of Nursing and excluded administrative appointments. The Regional Director correctly concluded that the University failed to meet its burden of establishing no rational basis for excluding clinical professor faculty from the appropriate bargaining unit, and the request for review should be denied.

VI. The Election should be held as directed by the Regional Director.

The Regional Director properly asserted jurisdiction, found an appropriate unit, and ordered an election. Thus, there is no basis for staying the election as requested by the Employer.

VII. Conclusion.

SU's request for review does not establish that the Regional Director departed from official Board precedent or that the decision is clearly erroneous on a substantial factual issue, nor does it establish that there are compelling reasons in this case for reconsideration of Board rules or policies. Under Section 102.67(c) of the Board's Rules and Regulations, the Board should deny the Employer's request.

DATED this 8th day of May, 2014.

DOUGLAS DRACHLER
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By____/s/_____
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CERTIFICATE OF SERVICE

I certify that on the 8th day of May, 2014, I electronically filed with the NLRB via e-file the Union's Statement in Opposition to Request for Review and served the document as follows:

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